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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 84

THE DAYTON BAR ASSOCIATION,
Respondent,

v.

ROBERT D. KEMPER,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE

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OCTOBER TERM, 1964

No. _____

THE DAYTON BAR ASSOCIATION,

Respondent,

v.

ROBERT D. KEMPER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Robert D. Kemper prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (Appendix A, infra) is reported at 175 O. S. ....

JURISDICTION

The judgment of the Supreme Court of the State of Ohio was entered on November 20, 1963. On November 26, 1963, a motion for re-hearing was filed with the Supreme Court of the State of Ohio, said motion being overruled on December 18, 1963. On March 12, 1964, by order of Mr.

Justice Stewart, the time within which to file the petition for a Writ of Certiorari was extended to and including May 16, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. 1257.

QUESTION PRESENTED

The Petitioner, Robert D. Kemper, an attorney at law, was charged with misconduct as an attorney at law. A hearing was had before the Board of Commissioners on Grievances and Discipline. That Board found that the Petitioner was guilty of certain acts of misconduct as defined by Rule XXVII of the Supreme Court of Ohio and recommended that the Petitioner be permanently disbarred from the practice of law. Between the time of the hearing before the Board of Commissioners on Grievances and Discipline and the date set for the hearing before the Supreme Court of the State of Ohio, the Petitioner was declared by the Probate Court of Montgomery County, Ohio, to be mentally incompetent and was placed in a psychiatric security ward of the Veterans Administration Hospital in Cincinnati, Ohio, with no visitors permitted to see him.

The questions are:

1. Whether the Petitioner received a fair trial or hearing before the Board of Commissioners on Grievances and Discipline because of his mental condition.

2. Whether what was done deprived him of his rights of due process of law as hereinafter set forth.

CONSTITUTION PROVISION INVOKED

Amendment XIV of the Constitution of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT

Robert D. Kemper, the Petitioner, is an attorney at law, admitted to practice law in the State of Ohio by the Supreme Court of the State of Ohio. He was charged in a complaint filed by the Dayton Bar Association, with ten specific acts of misconduct. Hearings were held before the Board of Commissioners on Grievances and Discipline at Dayton, Ohio, on December 14, 1961, and on April 17, 1962.

The Board found that Kemper was in fact, guilty of acts of misconduct as defined in Rule XXVII of the Supreme Court of Ohio and was also guilty of violations of the canons of professional ethics of the American Bar Association, and recommended that the Petitioner be permanently disbarred from the practice of law.

At the time of this hearing no evidence was introduced that the Petitioner was mentally ill at the time of the commission of the alleged acts of misconduct or at the time of the hearing before the Board. The Board, in its opinion, stated "The Board found that the mere fact that the statement or statements were made was evidence to the Board that the Petitioner did not have the necessary judgment to be an attorney and counselor of law." Subsequent to that hearing, the Probate Court of Montgomery County, Ohio, issued a commitment finding the petitioner mentally incompetent and he was, at the time of the hearing before the Supreme Court of Ohio, in the psychiatric security ward of the Veterans Administration Hospital in Cincinnati, Ohio.

A certified copy of the finding of the Probate Court of Montgomery County, Ohio, was presented to the Supreme Court of the State of Ohio at the time of the hearing before that august body and a continuance was requested, which was refused, so the Supreme Court of Ohio heard the appeal without his counsel being able to confer with him at all, and all we could do was tell the Court the situation and sit down.

Counsel now representing the petitioner did not represent him at the time of the hearing before the Grievance Committee and so told the Supreme Court of Ohio. We think that the Supreme Court of the United States will be more able to digest the case if we now state what the record shows and so we herewith quote verbatim that record, including the very able dissenting opinion of Judge Herbert.

HERBERT, J., dissenting. The occasion for this dissent arises from the opening sentence of the *per curiam* opinion:

"Upon oral argument, defense counsel suggested that respondent might be mentally ill."

The defense counsel referred to appeared in these proceedings for the first time at the hearing before this court.

The above-quoted observation that respondent "might be mentally ill" is at least a mild understatement.

Respondent was not present at the hearing before this court. He was, at the time, in a psychiatric "security" ward of the Veterans Administration Hospital in Cincinnati upon a commitment issued by the Probate Court of Montgomery County.

There was no formal presentment of evidence of mental affliction before the hearing panel or the Board of Commissioners on Grievances and Discipline, yet the majority opinion recites that, referring to certain statements of the respondent:

"The board found that the mere fact that the statement or statements were made was evidence to the board that the respondent did not have the necessary judgment to be an attorney and counselor of law."

The confused, garbled, rambling and disjointed statements of the respondent found in the record certainly would indicate an abnormal mentality.

Section 1, Rule XXVIII of Rules of Practice of the Supreme Court of Ohio, states that:

"These rules of professional conduct shall be binding upon all members admitted to practice law in the state of Ohio, *and the willful breach* thereof shall be punished by reprimand, by suspension, or by disbarment * * *." (Emphasis ours)

That respondent was mentally ill at the time of the hearing must be conceded. His presence in the veterans hospital under the law of Ohio would have required certain procedure including examination of the respondent by a physician or physicians and their certificates that he was mentally ill.

The commitment by the Probate Court of Montgomery County is further indicia that he was examined by at least one physician who before respondent could be committed would be required to certify that the respondent was mentally ill. It appears to me that there was a prima facie case of mental illness established before this court entered its judgment of permanent disbarment.

The requirement of Section 1, Rule XXVIII of the Rules of Practice of this court, that the court must find that the breach of conduct was "willful," would require at least some further investigation. With but little difficulty, this court could have available the records of physicians, prepared as required by the law of Ohio, that respondent entered the veterans hospital on August 20th, left September 18th, was returned by the Sheriff of Montgomery

County from the jail of that county on September 27th, 1963, and was placed in a "locked" psychiatric ward in the hospital. It would find, I believe, that respondent is and has been suffering from depression reaction—emotional instability.

It could be readily established whether the present mental illness of respondent was of long duration or otherwise.

There is a claim now pending before the Veterans Administration for service-connected disability of the respondent upon the claim that his mental illness is connected with his service in World War II.

I recognize that it is our duty to protect society by exercising the control given this court over members of the bar of Ohio. I recognize also that it is the duty of this court to protect the integrity of the legal profession. I believe also that an accused member of the bar is entitled to certain considerations and rights.

Permanent disbarment brings shame and disgrace upon a member of our profession. In the present state of mind of the respondent, a judgment of indefinite suspension would meet all requirements and responsibilities of this court. An indefinite suspension would place positive control of respondent's relation to the practice of law in the hands and control of this court. Such judgment should be attributed to his mental condition if further investigation warrants such conclusion.

The judgment of this court should be that the respondent be indefinitely suspended from the practice of law by reason of mental illness.

REASONS FOR GRANTING THE WRIT

The reasons for the granting of the writ are:

(a) That Petitioner could not and did not receive a fair hearing before the Board of Commissioners on Grievances

and Discipline, as provided for by the Fourteenth Amendment to the Constitution of the United States.

On December 14, 1961 and on April 17, 1962, hearings were held before the Board of Commissioners on Grievances and discipline concerning alleged acts of misconduct of the Petitioner. The Petitioner, at the time of the hearing, was represented by Counsel and no objection was made to the Petitioner being tried because of his mental incompetence. On September 25, 1963, the Probate Court of Montgomery County, Ohio, found that there was probable causes to believe that Robert Kemper was mentally ill, and he was sent to the Veterans Administration Hospital, Cincinnati, Ohio, a hospital for the mentally ill. This information was supplied to the Supreme Court of Ohio, which Court heard the matter on the report of the Board of Commissioners on Grievances and Discipline, on October 9, 1963. At that hearing a certified copy of the order of the Probate Court of Montgomery County, Ohio, was furnished to the Supreme Court of Ohio. The decision of the Supreme Court of Ohio, is set forth in Exhibit A.

The contention of the Petitioner is that he was mentally incompetent at the time of his hearings before the Board of Grievances and Discipline and, therefore, deprived of due process of law by having been tried before that Board when incapable of making his defense.

(b) That Petitioner was disbarred without due process of law.

In considering the question of due process, two main points present themselves. First, does the guaranty of due process of law, contained in the fourteenth amendment, apply to proceedings aimed at the revocation of an attorney's right to practice his profession? Second, if the due process clause applies, what is necessary to afford the accused attorney such due process?

The answer to question number one is clear; the guaranty of due process embodied in the fourteenth amendment does apply to disbarment proceedings. In *Schlesinger* it was stated that, "The right to practice law is constitutionally protected as a property right and no attorney can lawfully be deprived of such right except by due process of law. . . ." (*In re Schlesinger*, 172 A. 2d 835, 840 (Pa. 1961).)

The Supreme Court long ago classified the practice of law as a property right. In *Ex parte Wall* the Court said that, "(A)n attorney's calling or profession is his property, within the true sense and meaning of the Constitution. . . ." (*Ex parte Wall*, 107 U. S. 265, 289 (1882).)

In *Prouty, et al.* v. *Heron, et al.*, 127 Colorado, 168, 255 Pacific 2nd 755 (1953), a suit was brought by the plaintiff to enjoin the state board of examiners for engineers and land surveyors from classifying qualified engineers as to specific branches of their profession and to correct roster and licensing cards issued by the board to registered engineers and for other relief. The plaintiff had previously been granted a license to practice as an engineer and the state board of examiners for engineers and land surveyors had classified the plaintiff as a "civil engineer" without any court proceeding.

The court stated that the practice of the professions of law, medicine and dentistry are generally considered as learned professions and that the right to practice a learned profession was a "valuable right."

The court further stated at Page 758 "The right to practice such a profession has been recognized as a 'valuable right' or a 'property right' in other jurisdictions." From the case of *Abrams* v. *Jones*, 35 Idaho, 532, 207P724, 727 we quote the following:

> "Where the state confers a license upon an individual to practice a profession, trade, or occupation, such

> license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal."

In *Smith* v. *Department of Registration in Education, et al.*, 412 Ill. 322, 106 N. E. 2nd 722 (1952), an action was brought by a doctor whose license to practice medicine had been revoked. The court stated at Page 726 "Section 2 of Article II of the Constitution of the State of Illinois reads as follows: 'No person shall be deprived of life, liberty or property without due process of law.' A like provision is found in Amendment 14 of the Constitution of the United States. It has been universally held that a license to practice medicine is a "property right" within the meaning of the constitutional guarantees of due process of law. In the case of *People* v. *Love*, 298 Ill. 304, 131 N. E. 809, 811, 16 ALR 703, the court said:

> "The right to follow either one of these professions (physician or lawyer) is one of the fundamental rights of citizenship. A person's business, profession, or occupation is at the same time "property" within the meaning of the constitutional provisions as to due process of law."

It is stated in Volume 16a of Corpus Juris Secundum, Constitutional Law Section 669 at Page 1069, "Every person has the right to engage in any lawful occupation, trade or calling, and such right is "property" and "liberty" of which one may not be deprived without due process of law, and regulation of such right is justifiable only by the existence of exceptional circumstances. . . ."

Let us now consider the more difficult question of what is necessary to afford the accused attorney such due process. In *Bradley* v. *Fisher* (80 U. S. (13 Wall.) 335 (1871)), the Court noted that the power to remove an attorney from the bar should never be exercised without

notice to the attorney of the grounds of the complaint and ample opportunity for the attorney to be heard. They reasoned that, "*This is a rule of natural justice and is applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession. . . .*" (Emphasis ours.)

It is necessary that the notice and hearing, generally required in disciplinary actions, must be fair and reasonable, to satisfy the due process requirement.

In, *In re Schlesinger*, 172 A. 2d 835, 840 (Pa. 1961), on appeal to the Supreme Court of the state of Pennsylvania, the order of disbarment was reversed and the case remanded with directions to dismiss the complaint. The Court held that the proceeding violated the requirements of "due process" in that the respondent was not afforded the full, fair and impartial hearing to which he was entitled.

It is also necessary, in addition to the notice and hearing being fair and reasonable, that the defendant in a disciplinary action be competent and sane at the time of the hearing so that he may be able to make a defense at the time of that hearing. If he is not afforded this protection, then there has been a violation of his constitutional right to due process of law. (*State* v. *Davis*, 108 P. 2nd 641, 6 Wash. 2nd 696 (1940).)

The Petitioner herein was in the security ward of the Veterans Administration Hospital at the time of the hearing before the Supreme Court of Ohio. Counsel for the Petitioner was employed by the family of the Petitioner and never had an opportunity to speak with him. Counsel filed a motion with the Supreme Court of Ohio for a continuance of the case so that he might have a chance to speak with the Petitioner during a lucid moment, so that he might properly prepare and argue the case before the Supreme Court of Ohio. This motion for continuance was

denied by the Supreme Court of Ohio and the Petitioner was therefore not afforded his right to have a proper defense in his case made for him.

Judge Herbert in his dissenting opinion from the opening sentence of the per curiam opinion said "Upon oral argument, defense counsel suggested that respondent might be mentally ill," and he goes on to say that the words, 'might be mentally ill' is at least a mild understatement," before the Board that heard the case.

We point out that among the charges made against the Petitioner was one that he offered some money to somebody to murder a person, and another that he offered money to a clerk of the Municipal Court to dispose of some records. We submit, you do not have to be a lawyer to know that those requests are the requests of a diseased brain. We are not citing the other charges in the light of saving time.

Judge Herbert goes on and says, "The board found that the mere fact that the statement or statements were made was evidence to the Board that the respondent did not have the necessary judgment to be an attorney and counselor of law." The reading of the record will show that the statements of the Petitioner were as Judge Herbert said, "The confused, garbled, rambling and disjointed statements of the respondent indicated an abnormal mentality." He further states, "That respondent was mentally ill at the time of the hearing must be conceded," and "It appears to me that there was a prima facie case of mental illness established before this court entered its judgment of permanent disbarment."

What the Petitioner did was not the actions of a normal brain. We particularly call this Court's attention to what Judge Herbert said when he wrote:

> "I recognize that it is our duty to protect society by exercising the control given this court over members

of the bar of Ohio. I recognize also that it is the duty of this court to protect the integrity of the legal profession. I believe also that an accused member of the bar is entitled to certain considerations and rights.

Permanent disbarment brings shame and disgrace upon a member of our profession. In the present state of mind of the respondent, a judgment of indefinite suspension would meet all requirements and responsibilities of this court. An indefinite suspension would place positive control of respondent's relation to the practice of law in the hands and control of this court. Such judgment should be attributed to his mental condition if further investigation warrants such conclusion.

The judgment of this court should be that the respondent be indefinitely suspended from the practice of law by reason of mental illness."

We call attention of the Court to the case of *Stewart* v. *United States*, 275 Fed. 2d 617, reversed on other grounds 366 U. S. 1 (1960), the defendant was charged with first degree murder and robbery of his victim, wherein the principal defense was insanity of the accused who had been found competent to stand trial after appropriate proceedings. The Court stated at page 622 "While it is true that the primary issue is the accused's mental condition at the time of the offence, evidence as to his mental condition at other times becomes relevant when it is related and submitted under proper instructions. Ordinarily the mental condition of the accused at the time of trial may not be shown, and the jury may not be advised that he has been judicially found competent to stand trial. Where the accused has been found competent to stand trial, after appropriate proceedings, and the accused takes the stand and exhibits bizarre symptoms and abnormal behavior, which if truly reflecting his mental state would make a trial legally impossible, we have a different situation. The accused has

then, by his demeanor, put his mental condition as of the time of trial in issue."

In the case of *Fitts* v. *United States*, 284 F. 2nd 108 (1960), the appellant was adjudicated "mentally ill" approximately one month after the commission of a crime for which he was indicted. The Court stated at page 113:

"In *Frame* v. *Hudspeth*, 10 Cir. 109 F. 2nd 356, this court was confronted with the question of whether a general adjudication of insanity after the criminal act, was sufficient to raise the question of insanity and impose upon the court the duty to affirmatively inquire concerning mental capacity of the accused to enter a plea of guilty. The majority thought that the enquiry conducted by the court at bar was sufficient. But the case was reversed upon consent of the Solicitor General, and the cause remanded for the "Purpose of making a full enquiry into the mental status of the petitioner at the time he entered the pleas of guilty." (309 U. S. 632, 60 S. Ct. 712, 84 L. Ed. 989.)

Viewed in this light, it becomes reasonably clear that a diagnosis of mental illness necessitating committment to a mental institution a little more than a month after commission of the crime, is legally sufficient to raise the issue of mental capacity to commit the offense. In any event, we hold that the proof was sufficient to dissipate the presumption of sanity and to inject the issue of insanity as an element of the offense charge. In the absence of competent evidence of criminal responsibility, the accused was entitled to a directed verdict of acquittal."

In the case of *State* v. *Davis*, 108 P. 2nd 641, 6 Wash. 2nd 696 (1940), the court stated at page 650 ". . . If one accused of a crime and put on trial be insane at the time of the trial, his constitutional rights are violated, as an insane person is not capable of defending himself, and if found guilty and the sentence executed, he would be deprived of life or liberty without due process of law.

There has been considerable discussion in court opinions concerned with the matter of disbarment proceedings. These proceedings have been held to be "in its nature civil, and collateral to any criminal prosecution by indictment." (*Ex parte Wall*, 107 U. S. 265, 288; 1882) It has also been said that such proceedings although generally classified as civil, "are never-the-less of a quasi-criminal nature." (*Lenehan* v. *Commonwealth*, 165 Ky. 93, 176 S. W. 948, 954; 1954.)

The testimony given by the Petitioner was evidence of his mental illness at the time of the hearing. When this is tied to the fact that he was declared mentally ill by the Probate Court of Montgomery County, Ohio, subsequent to the hearing, this mental illness as a matter of law would relate back to the earlier hearing date. Even though no testimony was given, this court can take judicial notice of the fact that mental illness is unlike a broken bone, a long developing sickness.

It is the contention of the Petitioner that the fact that the objection was not raised at the time of the hearing before the Board of Commissioners on Grievances and Discipline as to the insanity of the Petitioner at the time of the hearing before the Board, is insignificant. The report of the Board of Commissioners on Grievances and Discipline is a recommendation to the Supreme Court of the State of Ohio, and the Supreme Court was aware of the mental condition of the Petitioner prior to the time of the making of its final decision. They were furnished a certified copy of the finding of the Probate Court of Montgomery County, Ohio at the time of the hearing before the Supreme Court.

In view of the foregoing cases, even though the Petitioner did not formally raise the question of his insanity at the time of the hearing, it was raised by the testimony which he gave and which, as Judge Herbert stated was "confused, garbled, rambling and disjointed."

Subsequent to the time of the raising of the question of the mental incapacity of the Petitioner, to stand trial, the Supreme Court of Ohio modified its rule on disciplinary procedures and included certain rules concerning mental illness as a grounds for suspension of an attorney at law, which prior to that time, were not included as a grounds for suspension.

CONCLUSION

The contention of the Petitioner is that since a disbarment proceeding is of a quasi-criminal type, and since his right to earn a livelihood is as dear as the incarceration of a prisoner, he must be afforded all of the requirements of due process which are afforded to a defendant in such a criminal action. The protection of the due process clause of the constitution of the United States affords the defendant the right to be able to make his defense at the hearing on the charges levied against him.

The Petitioner in this case was tried before the Board of Commissioners on Grievances and Discipline and at the time of that hearing did not object to the hearing because he was at that time insane. Subsequent to that hearing, but prior to the hearing before the Supreme Court of the State of Ohio, the defendant was adjudged mentally incompetent by the Probate Court of Montgomery County, Ohio, copy of which adjudication was filed in the Supreme Court of Ohio, prior to the hearing. Even though no such objection to the hearing was made and no medical testimony was introduced at the time of the hearing before the Board, we can take the testimony of the Petitioner as evidence itself of the mental incapacity of that Petitioner. The subsequent adjudication of incompetency would therefore relate back to the time of the original hearing before the Board, and therefore we can conclude the Petitioner was not afforded due process of law by having been tried while mentally incompetent.

We respectfully submit therefore that the motion for a writ of certiorari in this case be granted.

SIDNEY G. KUSWORM, SR.,
JACOB A. MYERS,
Attorneys for Petitioner.

EXHIBIT A

DAYTON BAR ASSOCIATION v. KEMPER

Attorneys at law—Misconduct—Disciplinary action—Permanent disbarment from practice of law—Acts warranting.

(D. D. No. 38—Decided November 20, 1963.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The relator, the Dayton Bar Association, filed a complaint against the respondent, Robert D. Kemper, Jr., charging him with misconduct as an attorney at law and setting forth ten specific charges of misconduct. A hearing was had before the Board of Commissioners on Grievances and Discipline.

The board found that respondent was guilty of soliciting professional employment to handle a claim for damages for personal injuries, and that the fee charged was excessive, extortionate and not reasonable under the circumstances.

The board found also that respondent undertook to represent a client in a divorce action theretofore commenced by a former associate of respondent who was to get $150 for his services, one-half to be paid by the client and one-half by the client's former husband; and that respondent collected $75 from the client's husband and, without revealing such fact, by threatening an attachment, collected $140 from his client, thus willfully and deliberately collecting a larger fee than was provided for in the contract.

The board found further that respondent contacted an employee of the police department and made an offer of money to her to influence a police officer to drop a certain charge pending against one of respondent's clients; and

that respondent solicited personal employment from a layman claim adjuster for an insurance company and offered to split fees with him and further requested the same adjuster to make payment on an unfounded claim, regardless of liability of the insurance company, and offered to split his fee thus obtained with the adjuster.

The board found further that respondent offered to a certain person the sum of $300 to commit a felony, *i. e.*, to cause bodily injury or death to a female person. The respondent, on the witness stand, did not deny that this female person was "bugging him" but stated that his offer was not made seriously or with any criminal intent. The board found that the mere fact that the statement or statements were made was evidence to the board that respondent did not have the necessary judgment to be an attorney and counselor at law.

The board found that the evidence presented did not support some of the charges filed, but that, from the foregoing findings of fact, the respondent was guilty of misconduct as defined in Rule XXVII of the Supreme Court and of a violation of the Canons of Professional Ethics of the American Bar Association, and recommended that respondent be permanently disbarred from the practice of law.

The matter is now before this court for consideration of the report of the board and the objections of the respondent.

Mr. Robert B. Womsley and *Mr. P. Eugene Smith*, for relator.

Mr. R. James Kemper and *Mr. Sidney Kusworm*, for respondent.

Per Curiam. Upon oral argument in this court, defense counsel suggested that respondent might be mentally ill.

Exhibit A

No suggestion of mental illness was made during the hearings before the board and no proof was offered tending to establish such fact. From a consideration of the record, this court is of the opinion that the board was neither in error nor unreasonable in its findings and recommendation. Although respondent was not personally present during the oral orgument in this court, he testified at the hearing before the board and was represented by counsel at the hearing on the merits and on the objections to the recommendations of the board.

Report confirmed and judgment accordingly.

TAFT, C. L., ZIMMERMAN, MATTHIAS, O'NEILL, GRIFFITH and GIBSON, J.J., concur.

HERBERT, J., dissenting. The occasion for this dissent arises from the opening sentence of the *per curiam* opinion:

"Upon oral argument, defense counsel suggested that respondent might be mentally ill."

The defense counsel referred to appeared in these proceedings for the first time at the hearing before this court.

The above-quoted observation that respondent "might be mentally ill" is at least a mild understatement.

Respondent was not present at the hearing before this court. He was, at the time, in a psychiatric "security" ward of the Veterans Administration Hospital in Cincinnati upon a commitment issued by the Probate Court of Montgomery County.

There was no formal presentment of evidence of mental affliction before the hearing panel or the Board of Commissioners on Grievances and Discipline, yet the majority opinion recites that, referring to certain statements of the respondent:

Exhibit A

"The board found that the mere fact that the statement or statements were made was evidence to the board that the respondent did not have the necessary judgment to be an attorney and counselor of law."

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That respondent was mentally ill at the time of the hearing must be conceded. His presence in the veterans hospital under the law of Ohio would have required certain procedure including examination of the respondent by a physician or physicians and their certificates that he was mentally ill.

The commitment by the Probate Court of Montgomery County is further indicia that he was examined by at least one physician who before respondent could be committed would be required to certify that the respondent was mentally ill. It appears to me that there was a prima facie case of mental illness established before this court entered its judgment of permanent disbarment.

The requirement of Section 1, Rule XXVIII of the Rules of Practice of this court, that the court must find that the breach of conduct was "willful," would require at least some further investigation. With but little difficulty, this court could have available the records of physicians, prepared as required by the law of Ohio, that respondent en-

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 84

ROBERT D. KEMPER, *Petitioner,*

v.

THE DAYTON BAR ASSOCIATION, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. OPINION OF THE COURT BELOW

On November 20, 1963, in a per curiam opinion, reported in 175 O.S. 285, 25 O.O. 2d 117, the Ohio Supreme Court confirmed the final report of the Board of Commissioners on Grievances and Discipline and ordered petitioner permanently disbarred from the pracitce of law. Petitioner filed a motion for rehearing which was overruled on December 18, 1963. On application to Mr. Justice Stewart, the time for filing a response to the Petition for Writ of Certiorari was extended to and including July 14, 1964.

II. JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, Section 1257 of the United States Code.

III. STATEMENT OF FACTS

The following is offered to supplement the petitioner's Statement.

On August 24, 1961, The Dayton Bar Association filed a complaint, applicable parts of which are set forth as Appendix "A" hereof, with the Board of Commissioners on Grievances and Discipline of the Supreme Court of the State of Ohio against the petitioner, Robert D. Kemper, pursuant to Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio, the pertinent parts of which appear as Appendix "B" hereof, charging conduct in violation of said Rule and in violation of Rule XXVIII of the Rules of Practice of said Court, which appears as Appendix "C" hereof, and in violation of the Canons of Professional Ethics of the American Bar Association, of which the Court can take judicial notice.

The Supreme Court of Ohio promptly notified Robert D. Kemper of the filing of the complaint, furnished him a copy thereof, and he employed lawyers to represent him in the proceedings. On September 30, 1961, Mr. Kemper filed an answer putting all matters at issue, by denying, generally, some of the allegations and offering explanation to excuse his conduct as to other allegations set forth in the complaint.

By a written notice, dated November 14, 1961, to all parties, the complaint was assigned for the presentation of evidence at Dayton, Ohio, on December 14, 1961.

The matter proceeded to hearing on the date assigned. Evidence was offered in support of the items of the complaint and petitioner's lawyer, and from time to time the petitioner, cross-examined the witnesses. The petitioner took the stand in his own defense and his lawyer took the stand to act as a character witness.

On December 20, 1961, the petitioner made application to the Supreme Court that the Board of Commissioners be reconvened to hear additional evidence in his behalf. On February 2, 1962, the application was granted. On April 4, 1962, all the parties received a written notice that the matter was assigned to permit the submission of additional evidence by Mr. Kemper, commencing on April 17, 1962. At that time, the petitioner offered the evidence of nine witnesses. Mr. Kemper interrogated the witnesses with the assistance of his lawyer.

No claim was made, no evidence was offered and petitioner's conduct did not suggest the possibility, that said Robert D. Kemper was mentally ill prior to or at the times of the trial on December 14, 1961, and April 17, 1962.

On October 18, 1962, the Commissioners filed a final report, entitled "Findings of Fact, Conclusions and Recommendation of Board of Commissioners", in the office of the Clerk of the Supreme Court, the appropriate parts of which are set forth as Appendix "D" hereof, recommending permanent disbarment of the petitioner, and submitted the same for confirmation and the issuance of an order thereon by the Ohio Supreme Court.

On October 19, 1962, the Supreme Court issued an order and mailed the same to Robert D. Kemper order-

ing him to file objections or show cause, before November 28, 1962, why the final report should not be confirmed. The petitioner filed objections to the report, supported by a 28-page brief, on November 24, 1962. No claim was made that petitioner was mentally ill at that time nor at any time prior thereto.

On January 16, 1963, nine months after the April 17, 1962, trial and three months after the filing of the Commissioners' final report, said Robert D. Kemper applied for and was granted admission to The Veterans Administration Hospital at Cincinnati for psychiatric care. The Supreme Court adjourned for its summer recess on June 28, 1963, and on the same day the petitioner discharged himself from The Veterans Administration Hospital.

On September 16 and September 18, 1963, the Clerk of the Supreme Court telephoned counsel for the petitioner and the Bar Association to advise the parties that the matter was assigned for oral argument on the final report of the Commissioners, and the objections thereto.

On September 19, 1963, an application was filed in the Probate Court of Montgomery County, Ohio, suggesting the mental illness of said Robert D. Kemper. On September 25, 1963, said Court found, on the testimony of David Kushnir, a physician engaged in the general practice of medicine, and on the testimony of members of his family and a friend, that there was probable cause to believe petitioner was mentally ill.

The Probate Court ordered petitioner committed to the Dayton State Hospital, an institution for the mentally ill, for examination and treatment, for a period not to exceed ninety days. For lack of room, peti-

tioner was transferred from the Dayton State Hospital to The Veterans Administration Hospital at Cincinnati two days later.

On October 9, 1963, the Supreme Court of Ohio heard the arguments of counsel on the final report of the Commissioners, at which time petitioner's attorney contended that the Court should not consider said final report by reason of the mental illness of said Robert D. Kemper.

On November 20, 1963, the Ohio Supreme Court confirmed the final report of the Commissioners and ordered that petitioner be permanently disbarred from the practice of law.

On December 30, 1963, the Montgomery County Probate Court ordered petitioner transferred from The Veterans Administration Hospital at Cincinnati to the Dayton State Hospital for psychiatric examination.

On January 7, 1964, the Montgomery County Probate Court heard the testimony of the same general practitioner, David Kushnir, and the testimony of Dr. Theodore Sills, the Assistant Superintendent and Director of the Clinic for Dayton State Hospital. Based on that testimony the Court found that petitioner was not mentally ill and not a proper party for hospitalization. The Bar Association did not participate in the proceedings in the Probate Court.

IV. SUMMARY OF ARGUMENT

Mr. Kemper was disbarred for misconduct involving the solicitation of employment as a lawyer, charging excessive fees, attempting to bribe public officials and for attempting to purchase the murder of a client.

The petitioner was informed of the charges which were lodged against him and, with the assistance of lawyers of his choice, participated in the defense which consisted primarily of justification of his conduct. Nine months after the trial and three months after the announcement of the Commissioner's recommendation for disbarment, petitioner claimed that he was mentally ill and that the Ohio Supreme Court should not hear the arguments of counsel respecting the Commissioner's report. The judgment of disbarment, rendered by the Ohio Supreme Court violates no constitutional provisions and is in harmony with decisions rendered by this Court, heretofore.

V. ARGUMENT

The petitioner was disbarred for the following misconduct:

1. For entering a hospital and soliciting employment as a lawyer by a man he did not know (R. 212). The man was under sedation (R. 213). Less than twenty-four hours before Mr. Kemper visited him, he suffered injury in a collision of motor vehicles (R. 202) which required the amputation of both legs the same day (R. 209). The person causing the injury was undeniably negligent (R. 203), financially responsible (R. 207) and the injured person was free of fault. The injured person could write his name but claimed he could not read (R. 202, 225). Mr. Kemper contracted for and received a fee of $45,000.00, fifty percent of the amount of a settlement negotiated shortly after the commencement of the trial of the case (R. 234).

2. For charging a fee which was excessive, extortionate and not reasonable under the circumstances of the case.

3. For attempts to bribe a public official.

4. For offering the sum of $300.00 to another person to murder a client (R. 317) who was disenchanted with Mr. Kemper's conduct in forging her name to settlement drafts issued by two insurance companies.

Evidence respecting the charges and the defense thereto was presented on December 14, 1961, and on April 17, 1962. Mr. Kemper and lawyers of his choice participated in the hearings before the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. The defense never included a denial of the charges. Mr. Kemper did not deny that he forged his client's name to the insurance drafts. He did not even deny, in fact he admitted, (R. 317) that he offered the sum of $300.00 for the murder of the client when she complained of the forgery. He simply offered explanation in justification of his conduct.

Mr. Kemper had ample notice of the time assigned for each hearing to take evidence. He was given every opportunity to present all of the evidence he wished to offer. He took an active part in questioning the witnesses, testified in his own defense and gave no indication that he was mentally ill. He made no defense that he was mentally ill at the time of the hearings nor at the time of the events described in the complaint.

After the record was closed, memoranda of applicable law and appropriate argument were furnished by the parties. The Commissioners weighed the evidence, made their final report and their recommendations to the Ohio Supreme Court.

The hearing before the Ohio Supreme Court was like hearings before the Supreme Court of the United States, at which the presence of a litigant is permissible

but not indispensable and at which evidence is not offered, not contemplated and not appropriate. The proceedings before the Court were limited to the arguments of counsel. Thereafter, the Court took the matter to deliberate, and then to accept, reject or modify the recommendations of the Commissioners.

Petitioner claims that he was mentally ill at the time of the hearing before the Supreme Court and argues that the hearing, under such circumstances, was a violation of his constitutional rights.

It is not conceded that Mr. Kemper is now or ever was mentally ill. Assuming, only for the purpose of the discussion, that the petitioner was mentally ill, as he claims, mental illness does not and should not serve to bar proceedings to remove Mr. Kemper's license to practice law in the State of Ohio. Disbarment proceedings are civil in nature and are not designed as punishment for the lawyer. Mental illness is a defense in a criminal case. It is not a defense in an action for disbarment. The purpose of disbarment is to protect the public from unscrupulous or dishonest lawyers.

The following Courts have held that insanity is not a bar to an order striking the name of an attorney for misconduct: *In re Kennedy,* 178 Pa. 232, 35 A. 995; *In re Manahan,* 186 Minn. 98, 242 N.W. 548; and *In re Patlak,* 368 Ill. 547, 15 N.E. 2d 309.

Among other things, this Court stated, in the case of *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 at 238, 239:

> "A state cannot exclude a person from the practice of law—in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

Mr. Kemper's rights respecting due process were not violated in this case. The proceedings did not transgress statutes or the Constitution of the United States.

The Supreme Court of the State of Ohio adopted rules under which lawyers are licensed to practice law in the State of Ohio and under which the license may be removed. Mr. Kemper's license was granted and it was removed in conformity with the rules of the Court.

The foregoing action is not inharmonious with admonitions of this Court. The admission to practice and the disbarment of attorneys are the exercise of the judicial power. For valid reasons, involving moral or professional delinquency, the admitting court can disbar a lawyer, after it has afforded the lawyer an opportunity to be heard. *Ex parte Garland,* 71 U.S. 333 at 379, sixth and seventh syllabi, 4 Wall. 333 at 379. In the case of *Ex parte Secombe,* 60 U.S. 9 at 13, 19 How. 9 at 13, the Court said:

> ". . . it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

The Ohio Supreme Court holds, in the case of *In re McBride,* 164 O.S. 419, 58 O.O. 242, 132 N.E. 2d 113, certiorari denied, 351 U.S. 965, 76 S. Ct. 1030, in the first syllabus:

> "The power to admit attorneys to the practice of law and to disbar, suspend or otherwise discipline them after admission, rests inherently in the judicial branch of the government."

See also *Cleveland Bar Association* v. *Pleasant,* 167 O.S. 325 at 335, 4 O.O. 2d 433 at 438, 148 N.E. 2d

493, certiorari denied, 358 U.S. 842, 79 S. Ct. 33; *Phipps* v. *Wilson,* 186 Fed. 2d 748 (7th Cir.); and *Saier* v. *State Bar of Michigan,* 293 Fed. 2d 756, certiorari denied, 368 U.S. 947, 82 S. Ct. 388.

The Ohio Supreme Court also held in the case of *In re Thatcher,* 83 O.S. 246, 93 N.E. 895, that proceedings to disbar an attorney do not involve punishment for the lawyer; they are civil proceedings, not criminal proceedings (*Konigsberg* v. *State Bar,* 353 U.S. 252 at 257) and disbarment merely removes the extraordinary privilege which was theretofore conferred upon the lawyer by the Court, in reliance on his good character. See also *State, ex rel. Joseph* v. *Crossland,* 152 O.S. 199, 40 O.O. 174, 88 N.E. 2d 289.

The foregoing is in harmony with this Court's ruling in the case of *Ex parte Wall,* 107 U.S. 265, from which we quote, beginning at page 289, to supplement the portion heretofore quoted by the petitioner:

> ". . . The constitutional privilege of trial by jury for crimes does not apply to prevent the courts from punishing its officers for contempt, or from removing them in proper cases. . . . The proceeding is in its nature civil, ... The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them. Undoubtedly, the power is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney. But when such a case is shown to exist, the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participa-

tion in the administration of the laws. The power to do this is a rightful one; and *when exercised in proper cases, is no violation of any constitutional provision.*

"It is contended indeed, that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury is in violation of the Fifth Amendment of the Constitution, which forbids the depriving of any person of life, liberty or property without due process of law. But the action of the Court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, *he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney.* . . .

"It is a mistaken idea that due process of law requires plenary suit and a trial by jury, in all cases where property or personal rights are involved. . . .

"The question, what constitutes due process of law within the meaning of the Constitution, was much considered by this Court in Davidson v. New Orleans, 96 U.S. 97; and Mr. Justice Miller, speaking for the Court, said: 'It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issuer affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.' . . .

"We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the Court, in the manner in which proceedings against attorneys, when the

question is whether they should be struck off the roll, are always conducted.

"We think that the Court below did not exceed its powers in taking cognizance of the case in a summary way, and that no such irregularity occurred in the proceeding as to require this Court to interpose . . . ." (Emphasis added).

The interest of the United States Supreme Court in the disbarment of lawyers by the State Court which issued the lawyer's license to practice is usually confined to questions of notice and the lawyer's opportunity to defend against the charges. In the case at bar, Mr. Kemper had notice; he received a copy of the complaint. Mr. Kemper had every opportunity to defend against the charges and did, in fact, defend with the assistance of able, experienced lawyers. In the cases of *Bradwell* v. *Illinois,* 83 U.S. 130, 16 Wall. 130 and *Re Lockwood,* 154 U.S. 116, 14 S. Ct. 1082, this Court held that the right to practice law is not a privilege or immunity within the meaning of the Fourteenth Amendment of the Constitution.

In the more recent case of *Theard* v. *United States,* 354 U.S. 278 at 281, the Court held that it does not, ordinarily, sit in judgment on decisions involving state questions or to review judgments of disbarment rendered by a State Court and added:

"The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control of the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo while Chief Judge of the New York Court of Appeals.

'"Membership in the bar is a privilege burdened with conditions" (matter of *Rouss,* 221 N.Y. 81, 84, 116 N.E. 782, 783). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' *People ex. rel. Karlin* v. *Culkin,* 248 N.Y. 465, 470-471, 162 N.E. 487, 489. The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do."

VI. CONCLUSION

The practice of law is not a nantral, inherent, vested right, guaranteed by the Constitution. Mr. Kemper enjoyed a privilege which was limited by the rules, defining misconduct, adopted by the grantor, the Ohio Supreme Court. His condition of mental health is not the factor about which the primary question circulates. The primary question involves the public interest and whether the public is harmed or is likely to be harmed by Mr. Kemper's abuse of his license to practice. He was guilty of the most serious misconduct. The Court did not abuse its discretion, it exercised it wisely in recalling his license. The judgment of the Ohio Supreme Court is in harmony with the decisions of this Court. The requirements of due process have been met.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

P. Eugene Smith
Robert B. Womsley
Counsel for Respondent

APPENDIX "A"

Complaint

(Filed August 24, 1961)

"Now comes the Relator and alleges that Robert D. Kemper, an Attorney at Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

"1. That in July, 1959, respondent solicited professional employment by Earl H. Smith, of 3424 East Second Street, Dayton, Ohio, to handle a claim for damages for personal injury suffered by the said Smith on or about July 22, 1959.

"2. That respondent conspired . . . to persuade Earl H. Smith, of 3424 East Second Street, Dayton, Ohio, to execute a written agreement for fees providing for a fee of 50% of the amount recovered for said Smith as the result of personal injuries suffered on or about July 22, 1959. Upon the Settlement of said Smith's claim for damages, respondent accepted compensation based upon said 50% fee agreement,

". . .

"(ii) That such contingent fee was excessive, extortionate and was not reasonable under all of the circumstances of the case.

"3. That respondent undertook the representation of Mary Jill Richey, of 1017 Broadview Boulevard, Dayton, Ohio, in an action for divorce theretofore commenced by Cheldon Lautenburg, respondent's associate in the practice of law;

"That said Lautenburg and Mary Jill Richey agreed that the fee for such service be $150.00, one-half to be paid by the client's husband, Fred Roock and one-half to be paid by the client;

"That respondent was made aware of the fee arrangement on August 6, 1960, before the hearing on the non-con-

tested divorce, proceeded with the hearing on the same day and thereafter collected the sum of $75.00 from Fred Roock, and in September, 1960, by threatening attachment of the wages of Mary Jill Richey, collected the sum of $140.00 from the said Mary Jill Richey without revealing that respondent had already collected one-half of the fee from the client's former husband.

". . .

"5. That during the month of July, 1960, respondent provided legal services for Matilda Vacchiani, in the course of which respondent came into the possession of

"(i) Draft No. C-04821, dated July 6, 1960, issued by Hartford Fire Insurance Company Group, to the order of Matilda Vacchiani and United Public Insurance Company, in the sum of $500.00;

"(ii) Draft No. 52609, dated July 14, 1960, issued by United Public Insurance Company, payable to Matilda Vacchiani and Howard W. Heywood, M.D., in the sum of $209.00;

and knowing that Matilda Vacchiani had not endorsed either draft, negotiated said drafts with the name, Matilda Vacchiani, appearing thereon.

"6. That during the fall of 1960, respondent solicited Donna Minns, employed in the Record Section of the Police Department of the City of Dayton, Ohio, and offered to pay her the sum of $50.00, to contact and influence a police officer to drop a charge (of driving while intoxicated), then pending against one of respondent's clients. Approximately one week thereafter, respondent approached the same Donna Minns and increased the previous offer to $200.00 for the same service.

". . .

"8. That respondent solicited professional employment by the owners of policies of automobile liability insurance

issued by State Automobile Mutual Insurance Company and offered to split, with George Mooney, a layman claim agent for said insurance company, contingent fees earned by respondent in the representation of persons, with claims for personal injury, referred to respondent by the said Mooney, and

"In the representation of a person claiming damage for personal injury against a policy holder of said State Automobile Mutual Insurance Company, offered the aforesaid George Mooney compensation if he would cause the settlement of the claimant's case without regard to liability or the extent or validity of the claim of injury;

". . .

"10. That respondent offered David George Clemmer the sum of $300.00 to commit a felony, i.e., to cause bodily injury and/or death to a female person.

"That in all of the aforesaid respects and in every other respect, respondent's conduct brings the legal profession into disrepute and is contrary to

"(i) Rules XXVII and XXVIII of the Rules of Practice of the Supreme Court of Ohio, particularly Sections (5) and (1)(b) of Rule XXVII and Sections (2) and (3) of Rule XXVIII, thereof; and

"(ii) The Canons of Professional Ethics of the American Bar Association, adopted by the Supreme Court of Ohio, particularly Sections 9, 11, 13, 14, 15, 16, 22, 27, 28, 29, 32, 34, 35 and 38 of said Canons."

APPENDIX "B"

Rule XXVII

Disciplinary Procedure

(Effective January 1, 1957)

"Pursuant to the powers of this Court over the Bar of this State and the members thereof, Rule XXVII is hereby amended, as follows, effective on January 1, 1957, and to remain in force until altered or abrogated.

"*(1) Creation of Board of Commissioners on Grievances and Discipline.* There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners is empowered and charged to receive, entertain, inquire into, take proofs, make findings and submit recommendations to this Court, as hereinafter provided,

"(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by any attorney or counselor at law or judge, or

"(b) concerning practices of any attorney and counselor at law or judge, which tend to defeat the administration of justice or to bring the courts or the legal profession into disrepute, or

"(c) relating to petitions for reinstatement as an attorney and counselor at law in this state.

"*(2) Investigations by Local or State Bar Committees.* Said Board of Commissioners on its own motion may cause to be instituted as to any such matters whatever investigation or action it deems proper by referring the matters to the Grievance Committee of the appropriate local bar association or to the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association.

"*(3) Appointment of Board of Commissioners.* Said Board of Commissioners shall consist of seventeen (17)

members of the Bar of this Court, appointed by this Court. One member of such Board shall be appointed from each of the following districts: . . .

"*(4) Board to Have Exclusive Jurisdiction; Authority of Local Committees.* From and after the effective date of this rule, all proceedings for the investigation of complaints and grievances involving alleged misconduct by attorneys and conselors at law and judges, all proceedings for the discipline of such attorneys and counselors at law and judges, and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule; provided, however, that nothing herein contained shall be construed to prevent any committee of any regularly organized local bar association or of the Ohio State Bar Association from investigating and reporting on any complaint filed with it, referred to it, considered by it, or coming to its attention.

"*(5) Definition of Misconduct.* Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this state, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude.

"*(6) Manner of Discipline.* Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

"(a) a permanent disbarment from the practice of law, or

"(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

"(c) a public reprimand, or

"(d) a private reprimand.

"*(7) Effect of Discipline.* A person disbarred shall never thereafter be readmitted to the practice of law in this state. A person who shall have voluntarily surrendered his license to practice and thereafter has been reinstated in the manner hereinafter provided and a person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. A person who has been publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

"*(8) The Complaint, by Whom Signed.* A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct of one, who shall be designated therein as the Respondent. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and has accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint. The complaint may also, but need not, be signed by the person aggrieved.

"*(9) Duty of Board upon Filing of Complaint; Notice to Respondent; Time for Answer.* All such complaints shall

be filed in quadruplicate in the office of the Secretary of the Board of Commissioners. If said Board of Commissioners finds that the complaint, upon its face, does not charge misconduct as herein defined, such complaint shall be dismissed. Otherwise said Secretary forth with shall cause a copy of such complaint to be sent by registered mail to the Respondent named therein with a notice requiring him to file within twenty (20) days after the mailing of such notice his answer in quadruplicate, and serve copies thereof upon counsel of record named in the complaint.

"*(10) Hearing by Panel of Three Commissioners.* After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Chairman of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes.

"*(11) Duty of Panel if Charge Dismissed.* If the panel finds that the charges in any complaint do not merit the taking of disciplinary action, the complaint shall be dismissed, and such dismissal shall be reported to the Secretary of the Board of Commissioners, who shall notify the Respondent and all counsel of record of such action and shall notify the local bar association or associations of the County or Counties in which the Respondent resides and maintains his office, and of the County or Counties from which the complaint arose, of such action.

"*(12) Private Reprimand; Duty of Panel.* If the panel finds and determines that the Respondent is guilty of misconduct and that private reprimand should be administered, such panel shall administer such reprimand and such action shall be reported to the Secretary of

the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by such panel.

"*(13) Public Reprimand; Suspension or Permanent Disbarment; Duty of Panel.* If the panel finds and determines that the Respondent is guilty of misconduct and that public reprimand, indefinite suspension, or permanent disbarment is merited, the panel shall make its certified report of the proceedings before it, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, with the Secretary of the Board of Commissioners.

"*(14) Review by Entire Board of Commissioners; Board to Administer Private Reprimand.* Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a further hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

"*(15) Public Reprimand; Suspension or Permanent Disbarment; Duty of Board after Review.* If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law

or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

"*(16) Show Cause Order Issued by the Court to Respondent.* Upon the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause before this Court at a time to be specified not less than forty (40) days after the issuance of such order, why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered. Notice thereof shall be served by the Clerk of this Court upon the Respondent and all counsel of record, personally or by registered mail.

"*(17) Time for Filing Objections by Respondent.* At least twenty (20) days before the date for showing cause stated in the order of this Court, the Respondent shall file, in the number and form required by rules of this Court for original actions, objections, setting forth the grounds thereof, to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report upon which said order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof upon the Secretary of the Board of Commissioners and upon all counsel of record for the Relator in the hearing before the Board of Commissioners.

"*(18) Time for Filing Briefs by Relator.* Counsel for the Relator before the Board of Commissioners shall file or cause to be filed in the number and form required by the rules of this Court for original actions, such briefs as are deemed necessary in answer to any brief filed by Respondent, together with proof of service of copies thereof upon Respondent or counsel of record for Respondent. The same shall be filed within fifteen (15) days after the filing of Respondent's brief. Extension of time for filing objections and briefs shall be governed by rules applicable to original actions.

"*(19) Review by Court; Reimbursement for Expenses of Board; Duty of Clerk upon Entering Order.* Upon failure of Respondent to file objections within the time limited above, or after consideration of such objections and such briefs as may be filed for and against the same, and after hearing, if requested by this Court, this Court shall enter such order upon the matter as it may find proper, which may include such provision for reimbursement of the actual and necessary expenses incurred by the Board of Commissioners in connection with said proceedings as the Court shall deem just. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent, at his last known address, to the local bar association or associations in the County or Counties in which the Respondent resides and maintains his office and the County or Counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such County or Counties, and to the Presiding Judge of the United States District Court having jurisdiction in such County or Counties.

(20) Proceedings Private until Filed in Supreme Court. Unless and until filed in the Supreme Court of Ohio, all proceedings and documents relating to complaints and hearings thereon and proceedings in connection there-

with shall be private, unless the Respondent shall request in writing that they be public.

". . .

"*(27) Manner of Service of Notices, etc.* Whenever provision is made for the service of any notice, order, report or other paper or copy thereof upon any Respondent or Petitioner in connection with any proceeding involving a complaint or a petition for reinstatement, service may be made upon counsel of record for such Respondent or Petitioner, either personally or by registered mail.

"*(28) Quorum of Panel or Board.* A majority of the members of the Board of Commissioners or of a hearing panel shall constitute a quorum for all purposes and the action of a majority of those present comprising such quorum shall be the action of the Board of Commissioners or of such hearing panel.

"*(29) Clerk Is Agent for Service of Notices on Nonresident Attorney.* Any nonresident of this State, having been admitted as an attorney and counsel at law by the rules of this Court, or any resident of this State, having been admitted as an attorney and counsel at law by the rules of this Court, who subsequently becomes a nonresident or conceals his whereabouts, by such admission to the practice of law within this State makes the Clerk of this Court his agent for the service of any notice provided for in any proceeding instituted before the Board of Commissioners against such attorney and counsel at law or judge, pursuant to this rule.

"*(30) Manner of Service on Clerk; Record of Such Service Not a Public Record.* All such notices shall be served by the Secretary of the Board of Commissioners upon the Clerk of this Court by leaving at the office of said Clerk a true and attested copy of such notice and any accompanying document and by sending to the Respondent, by registered mail, postage prepaid, return receipt requested, a

like, true and attested copy, with an endorsement thereon of the service upon said Clerk of this Court, addressed to such Respondent at his last known address. The postmaster's receipt for the payment of such registered postage shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board of Commissioners or Court before which there is pending any proceeding in which notice has been given as provided in this section may order such continuance as is necessary to afford the Respondent reasonable opportunity to appear and defend. The Clerk of this Court shall keep a record of the day and hour of the service upon him of such notice and any accompanying document, which shall not be a public record in the office of said Clerk.

"*(31) Each Member of Board to Have Power to Issue Subpoenas.* Each member of the Board of Commissioners shall have power to issue subpoenas and to cause testimony to be taken under oath. All such subpoenas shall be issued in the name and under the seal of this Court and shall be signed by a member of the Board of Commissioners.

"*(32) May Order Depositions.* Any member of the Board of Commissioners may order testimony of a witness to be taken by deposition within or without this State in the manner prescribed for the taking of depositions in civil actions, and such depositions may be used to the same extent as permitted in civil actions.

"*(33) Effect of Refusal to Testify.* The refusal or neglect of the person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be deemed to be contempt of this Court and shall be punishable accordingly.

"*(34) Rules of Evidence.* All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel, who shall enter formal appearance.

"*(35) Docket of Complaints.* The Secretary of the Board of Commissioners shall keep a docket of each complaint and of all proceedings thereon, which shall be retained permanently as a part of the records of his office.

"*(36) Board May Prescribe Rules.* The Board of Commissioners may, subject to the prior approval of this Court, adopt other rules and regulations not inconsistent herewith.

"*(37) Rule to be Liberally Construed.* The process and procedure under this rule and other regulations approved by this Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objection, report or order to show cause may be made at any time prior to final order of the Court. The party affected by such amendment shall be given reasonable opportunity to meet any new matter presented thereby. No investigation or procedure shall be held to be invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice. This rule and such regulations relating to investigation and proceedings involving complaints of misconduct and petitions for reinstatement shall be liberally construed for the protection of the public, the Courts and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or susbequent to the amendment of this rule. To the extent that application of this amended rule to such pending proceedings may not be practicable, the rules and regulations in force at the time this amended rule became effective shall continue to apply."

APPENDIX "C"

Rule XXVIII

Rules of Professional Conduct

(Effective January 12, 1954)

"*Section 1.* These rules of professional conduct shall be binding upon all members admitted to practice law in the State of Ohio, and the wilful breach thereof shall be punished by reprimand, by suspension or by disbarment, as may be determined by any court of competent jurisdiction.

"The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association are adopted; and nothing in these rules is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation thereof.

"*Section 2.* An attorney at law shall not advertise or otherwise solicit professional employment. This rule shall not apply to the publication or use of ordinary professional cards or conventional listings in legal directories and newspapers.

"*Section 3.* An attorney at law shall not employ another to solicit or to obtain or remunerate another for soliciting or obtaining professional employment for him.

"*Section 4.* An attorney at law shall not acquire an interest adverse to a client in a subject-matter concerning which the attorney has been employed.

"*Section 5.* An attorney at law shall not, directly or indirectly, without the consent of his client, purchase property at a Probate, foreclosure or judicial sale in an action or proceeding in which he appears as attorney for a party.

"*Section 6.* An attorney at law shall not represent conflicting interests except with the consent of all parties concerned.

"*Section 7.* An attorney at law shall not accept professional employment without first disclosing to his prospective client his relation, if any, with the adverse party, and his interest, if any, in the subject-matter of the employment.

"*Section 8.* An attorney at law shall not accept employment adverse to a client or former client relating to a matter in reference to which he has obtained confidential information by reason of and in the course of his employment by such client or former client."

APPENDIX "D"

Findings of Fact, Conclusions and Recommendation of Board of Commissioners

(Filed October 18, 1962)

"This matter came on for the consideration of the Board of Commissioners on Grievances and Discipline on the report of the Hearing Panel, the transcript of the proceedings before said Panel and the record. On consideration whereof the Board makes the following Findings of Fact, Conclusions and Recommendation:

"As to Charge No. 1 the evidence shows that the respondent went to the hospital where Earl H. Smith was

"Findings of Fact

a patient within twenty four (24) hours after he had received serious personal injuries, having both legs amputated below the knees, on the excuse that he was going to investigate a matter of medical payments under an insurance policy. The medical payments under an insurance policy are payable without regard to fault and therefore no investigation was indicated or necessary. While respondent was there for said purported reason he happened to have just one (1) copy of a contingent fee contract with him and had the said Earl H. Smith sign the same although said Earl H. Smith was under sedation at the time. Later, however, the evidence shows that that contract was changed in several respects and eventually the respondent along with an attorney by the name of Schroader represented this claimant in the Federal Court at Dayton, Ohio, in an action growing out of said personal injuries.

"The Board finds from the evidence that the Respondent is guilty of Charge No. 1.

"As to Charge No. 2 the Board finds that the evidence was (satisfactory) to prove . . . . Paragraph II that said

contingent fee was excessive, extortionate and was not reasonable under all circumstances. The evidence shows that the said Earl H. Smith was operating a heavy piece of equipment on a super highway near Dayton, Ohio. The evidence shows that said claim for Earl H. Smith grew out of a Trans World Airways truck striking the rear end of his heavy equipment and therefore the liability in the matter was beyond question and the only matter to be determined was the amount. The evidence further shows that the matter was compromised for Ninety Thousand Dollars ($90,000.00) and the respondent and Mr. Schroader took Forty Five Thousand Dollars ($45,000.00) for their fee in this matter.

"The Board therefore concluded that Paragraph II of the second charge was sustained by the evidence and the respondent was guilty thereof.

"As to charge No. 3 the respondent undertook to represent one, Mary Jill Richey, in an action for divorce theretofore commenced by a former associate by the name of Cheldon Lautenburg and that there was an agreement that Lautenburg should get for his service One Hundred Fifty Dollars ($150.00) one-half (½) to be paid by the clients husband, Fred Rooch, and one-half (½) to be paid by the client; that respondent knew of said arrangement and before the hearing on the non-contested divorce collected Seventy Five Dollars ($75.00) from Fred Rooch and by threatening an attachment, collected One Hundred Forty Dollars ($140.00) from Mary Jill Richey, without revealing that he had already collected one-half (½) of the fee from the client's former husband and therefore the Board finds that the respondent willfully and deliberately collected a larger fee than provided for in the contract and that he is guilty of Charge No. 3.

". . .

"As to Charge No. 5 the evidence shows that the respondent did endorse the drafts as alleged in the charge

but that the money eventually reached the persons who were entitled thereto and that in spite of the fact that he may have endorsed them without authority, which is not good practice, since the money went to the persons who were entitled thereto under the drafts that there was no one injured by that process and therefore the Board finds that said charge is not supported by the evidence.

"As to Charge No. 6 the evidence shows that Donna Minns was employed by the Record Section of the Police Department and that the respondent contacted her and made an offer to her of Fifty Dollars ($50.00) to influence the police office to drop a charge of driving while intoxicated pending against one of respondents clients. The evidence further shows that he also made an offer of Two Hundred Dollars ($200.00) for the same service to the same person and the Board therefore finds that said Charge No. 6 is sustained by the evidence and respondent is guilty of Charge 6.

". . .

"As to Charge No. 8 the Board finds that the respondent solicited personal employment from George Mooney a layman claim adjusted of an insurance company and offered to split fees with him and further that he also requested said George Mooney to make payment on an unfounded claim regardless of liability of the insurance company and to split his fee obtained thusly with the said George Mooney and therefore the Board finds the respondent guilty of both paragraphs of Charge No. 8.

". . .

"As to Charge No. 10 the evidence shows that the respondent offered the said David George Clemmer the sum of Three Hundred Dollars ($300.00) to commit a felony; i.e. to cause bodily injury and/or death to a female person. The respondent on the witness stand did not deny that Matilda Vacchiani was "bugging him" and that

he said the things that he did to David George Clemmer but attempted to explain it by saying that it was not made seriously or with any criminal intent. The mere fact that the statement or statements were made was evidenced to the Board of Commissioners that this respondent did not have the necessary judgment to be an attorney and counselor at law and in fact the statements were made to a person who was of questionable reputation does not show the necessary qualifications in this respondent to be and remain an attorney at law.

"The report of the Hearing Panel and the record revealed to the Board that the associates of the respondent were not of the reputation and standing in the community to associate with one who is charged with the serious responsibility of being an attorney at law.

"The Board finds that the evidence does sustain the charge in No. 10 and therefore finds the respondent guilty under said Charge 10.

"*Conclusions of Law*

"It is the determination of the Board of Commissioners from the foregoing findings of fact that the respondent is guilty of misconduct as defined in Section 5, Rule XXVII of the Supreme Court of Ohio and that the record discloses a violation of Sections 13, 27, 29, 34 and 38 of the Canons of Professional Ethics of the American Bar Association adopted by the Supreme Court of Ohio.

"*Recommendation*

"It is the Recommendation of the Board of Commissioners on Grievances and Discipline that the respondent, Robert D. Kemper, be permanently disbarred from the practice of law."